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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 46

JAMES E. PEURIFOY, PAUL V. STINES AND BETTY O. STINES, JOHN S. HALL AND DORIS D. HALL,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY OF PETITIONERS TO AUTHORITY FILED AFTER ORAL ARGUMENT

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FACTS

Under date of October 23, 1958, respondent filed a copy of the opinion of the decision of United States Court of Appeals for the Eighth Circuit rendered in

the case of *Commissioner of Internal Revenue* v. *Peter F. Janss* under date of October 20, 1958. Oral argument on the instant case was concluded before this Court on October 20, 1958.

ARGUMENT

In its consideration of the facts in the case of *Peter F. Janss*, P-H Mem. T.C. Dec., Par. 57,084, the Tax Court equated the facts in *Janss* decision with the facts in its decision of the *Peurifoy* case here involved (Pet. Br., p. 13a).

A careful consideration of the two cases discloses that there are fundamental differences in the two respective fact situations:

(a) *Janss* voluntarily sought work away from home because of the opportunity for larger pay. Petitioners herein were referred to work away from home by the Union when no work was available near their homes (Pet. Br., p. 7).

(b) *Janss* procured his work by personal solicitation seeking work of his own choosing. Petitioners herein were sent to available work sites by Union referral (Resp. Br., pp. 2, 3).

(c) *Janss* took a position that could have been filled from local labor supply. Union referrals come from requests of other jurisdictions to supply workers not locally available (Resp. Br., p. 3).

The opinion of the Court of Appeals in the *Janss* decision recognized these basic factual differences in the respective situations saying (p. 5):

> " . . . The *Schurer* and *Leach* decisions may likewise be distinguished, the former because it was prior to the *Flowers* decision and *both because of*

the needs of the trade or business." (Emphasis added).

The findings of fact in the case of *Harry F. Schurer*, 3 T.C. 544, are as follows:

> "Petitioner has always carried on his trade as plumber at Pittsburgh, Pennsylvania. He is registered as such under an ordinance of Pittsburgh and is required to register each year. He has always looked to his local union for employment. In December, 1940 he was requested by his local union to go to Indiantown Gap, Pennsylvania, which is 22 miles from Harrisburg to work on a soldier's cantonment. He worked there three weeks in 1940 and four weeks in 1941. In 1941 he spent $80.00 for meals and lodging while employed at Indiantown Gap and $5.12 for train fare back to Pittsburgh. Shortly thereafter he accepted employment through his union in the construction of a cantonment at Aberdeen, Maryland. He worked there nine weeks, spending $180.00 for meals and lodging and $12.34 for transportation from Pittsburgh to Aberdeen and return.
>
> "Shortly thereafter he was requested to go to Morgantown, West Virginia, to assist in the construction of an Ammonia plant for the duPont Co. He was there for a period of 33 weeks, after which he returned to Pittsburgh. His expenses at Morgantown were $660.00 for room and board and $3.80 for bus fare from Pittsburgh to Morgantown."

In the *Schurer* case the Commissioner disallowed the travel expenses for the identical reason he disallowed the expenses in the instant cases. The Tax Court held the expenses to be properly deductible in that case and the Court of Appeals for The Eighth Circuit in its *Jauss* decision held that the expenses of *Schurer*

were properly deductible. The facts in the instant cases and the facts in the *Schurer* case are strikingly identical as shown by the above quotation.

The case of *E. G. Leach,* 12 T.C. 20, is very similar to that of *Schurer.* The following are the findings of fact from the opinion (12 T.C. 21):

> "The husband was employed during all of the year 1945 by a construction company to erect structural steel. He had no station or regular place of employment during 1945. His employment required him to be away from Florence for 49 weeks during 1945 and to be for short periods, varying, from a few weeks to several months, at various places so remote from Florence that he had to rent lodging for himself at each place. He could not move his wife and child to those places because of the shortness and indefiniteness of the duration of each job and the unavailability of accommodations."
>
> "The cost of lodgings for himself while away from home in pursuit of his trade or business during 1945 was $564.00. That amount was an ordinary and necessary expense of his trade in 1945."

The Eighth Circuit reached its decision in the *Janss* case on the basis that the facts did not support a finding that requirement three of the *Flowers* case (*Commissioner* v. *Flowers,* 326 U.S. 465) had been met, saying (p. 6):

> "Clearly, the facts in the instant case require a finding that the third condition set forth by the Supreme Court in the Flowers case has not been met."

This was clearly a proper application of the pertinent principles of law.

In the instant proceeding, respondent conceded in his oral argument that petitioners have met requirement three of the *Flowers* case. Such position of respondent is in accord with the facts, is in accord with the principles of law set forth by the Supreme Court in the *Flowers* case, and is in accord with the *Leach* and *Schurer* decisions of the Tax Court which were endorsed by the Circuit Court of Appeals for the Eighth Circuit in the *Janss* decision.

In its opinion below the United States Court of Appeals for the Fourth Circuit did not make an evaluation of the facts as required by *Flowers* and apply such evaluation to the three requirements of the *Flowers* case. The Court of Appeals below based its decision on the principle of substantive law that "home is synonymous with an indefinite post of duty". It is also to be noted that the *Leach* case *allowed* the deduction after determining the work was "indefinite".

It is to be further noted that the Court of Appeals for the Eighth Circuit *did not endorse* the opinion of the Court of Appeals for the Fourth Circuit. Conversely, it took exception to such opinion. After quoting at length from the *Peurifoy* decision in the Fourth Circuit, the Court of Appeals for the Eighth Circuit said (p. 5):

> "The 'exception to the rule' of the *Commissioner* v. *Flowers* case and referred to above does *not seem to us to be supported by the cases cited therefor.*" (Emphasis added).

It is also apparent that the Eighth Circuit *did not subscribe* to the concept of there being an "exception" to the *Flowers* decision as evidenced by its putting

the phrase 'exception to the rule' in quotes. The Eighth Circuit avoided this pitfall by properly making an evaluation of the *facts* against the three requirements of *Flowers*.

Petitioners submit that the Tax Court reached its decision in the *Janss* case by erroneously treating the doctrine that "home is synonymous with a place of indefinite employment but is not synonymous with a place of temporary employment" as a rule of substantive law.

Petitioner *Janss* was obviously engaged in "temporary" employment. The practice of the Tax Court of concluding that temporary employment gives rise to deductible expense as a matter of law worked in reverse in the *Janss* case. In *Janss* this doctrine *created* the deduction. Conventionally, the label of "non temporary" produces a denial of the deduction. The established practice of the Tax Court of ignoring the three requirements of the *Flowers* case left the Court without means of properly disqualifying the deduction. In this respect, petitioners in their brief said (Pet. Br., p. 27):

> "A decision on this point to the effect that the expenses in question are not 'personal' does *not* determine their deductibility under Section 23(a)(1)(A). This latter question logically is brought to account against the three requirements of *Commissioner* v. *Flowers*."

The function of bringing the matter to account against the three requirements in the *Flowers* case is exactly the function performed (and properly so) by the Eighth Circuit in its *Janss* decision. The decision of the Court of Appeals in the *Janss* case also illustrates that the safeguards erected in the statute, when

properly applied, are fully adequate to strike down unwarranted claims for travel expense deductions. The decision also illustrates that the claim made by respondent that the doctrine that "home is synonymous with post of duty or indefinite post of duty" is necessary to prevent abuse of the travel expense deduction is not justified.

CONCLUSION

The Eighth Circuit in the *Janss* decision said that the *Leach* and *Schurer* decisions were properly decided. The facts in those two cases are almost an exact parallel to the facts in the instant cases. It is respectfully submitted that the decision of the United States Court of Appeals for the Eighth Circuit rendered in the case of *Commissioner of Internal Revenue* v. *Peter F. Janss* under date of October 20, 1958 is in accord with the principles of law advocated by petitioners in their briefs herein filed in this proceeding.

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